IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPLICATION NO. 636 OF 2005

ALONG WITH

CRIMINAL APPLN. NOS. 637 & 638 OF 2005

Mrs. Kalpana D. Dalal & Anr. ... Petitioners

Versus

Vijay Nagardas Shah & Anr. ... Respondents

Mr. Shirish Gupte with P.D.Desai for petitioners (in all matters)

Mr. Ganesh Gole for Responkdent No.1 (in all matters)

Mrs. S.V.Gajare, APP, for State (in all matters).

CORAM: S.K.SHAH,J.

DATE : 17th October, 2006.

P.C.

1. All these Criminal Applications are between the same parties, but arising out of bouncing of different cheques. Since the facts are similar and the points involved are similar, I propose to dispose of these three Criminal Applications by common order.

2. Rule, returnable forthwith. Heard finally.

3. In all the 3 matters, a complaint was filed by the Respondent against the partnership firm and the partners including accused nos. 3 and 6 who have filed these Applications. The Magistrate issued the process. The same was challenged. This Court by order dated 14.7.2000 passed in Cri. Application No.1872 of 2000 that "In view of the Supreme Court Decision reported in 1992 Cr. L.J. page 3779 (K.M.Mattews vs. State of Kerala & Ors.) the proper course for the petitioners would be to approach the concerned Magistrate for recalling/rescending of the process." As such, the said Application was disposed of and the applicants preferred application before the Magistrate for dropping the proceedings against them. However, the learned Magistrate passed the following order :-

> "The accused are absent. In view of Judgment of Hon'ble Apex Court in Cri. Appeal No.91/2002 (Adalat Prasad's case), this Court has no jurisdiction to deal with this application. Hence it is rejected."

This order therefore came to be passed in view of the Apex Court's judgment in Adalat Prasad's case, which laid down that the Magistrate has no jurisdiction to recall the order of process. Therefore, these Applications came to be filed.

4. The learned Counsel for the petitioners states that in all the three cases, there is no averment made in the complaint against them (accused Nos. 3 & 6) to show that they were in charge of and responsible for the conduct of the business of the firm.

5. The learned Counsel for the petitioners relied on the decision of the Apex Court in the case of Monaben Ketanbhai Shah & Anr. Vs. State of Gujarat & Ors. reported in 2004 ALL MR (Cri) 3170 (SC) and submitted that the complaint must show not only that the applicants were in charge of the business of the partnership firm but also show how they are in turn responsible.

6. As against this, the learned Counsel for the Respondent states that the allegations made in the complaint show the involvement of the applicants in commission of the offence. He also further submits that the original accused No.2 who had issued the cheque was bounced. He, therefore, prays for dismissal of the Application.

7. Coming to the aspect of filing of Revision before the Sessions Court, the view is taken by this Court in the case of Veer Chaphekar Nagari Sahakari Pasanstha Maryadit & Ors. vs. Tanaji Dinkar Wadkar & Ors. reported in 2005 ALL MR (cRI) 2518 that revisiion can lie before the Sessions Judge against the order of

process passed by the Magistrate.

8. It is submitted that although revision can lie, that does not mean that the powers of this Court under Section 482 of the Criminal Procedure Code are not available. It is clear that powers under Sec. 482 of Cr.P.C. are available. In the present case, the petitioners have come second time to this Court. This is therefore a fit case where these powers shall have to be exercised where there are no sufficient averments made in the complaint so as to proceed against the petitioners (original accused No.2 and 6) for the offence under Section 138 read with Sec. 141 of the Negotiable Instruments Act.

9. Perusal of the complaint will show that all the allegations are made against the accused Nos.2 to 5 in para 15 only. It is averred that the accused Nos.2 to 5 are partners of accused No.1 and are in charge of day to day affairs and the business and management of accused No.1 and responsible for the partnership firm. Beyond this, there is no other allegation made in the complaint to show how the original accused Nod. 3 and 6 are responsible for the conduct of the business of the firm. It is also submitted that there is no presumption that a person because he is a partner of the firm is responsible for the conduct of the business of the firm. The accused No.3 is a lady. It is possible that she is a dormant partner not actually taking part in the

conduct of the business of the firm. So far as accused No.6 is concerned, he is not even a partner of the firm. It was therefore necessary for the complainant to aver in the complaint as to how these two accused were in charge of and responsible for the conduct of the business of the firm. In absence of any such averment, the process could not have been issued by the Magistrate against these two accused persons. Therefore, the complaint as against these two accused shall have to be quashed.

Hence, the following order :-

> All the Criminal Applications are, therefore, allowed. The process issued against them is hereby quashed and the complaint as against them is dismissed.

(S.K.SHAH,J.)